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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-655

CHARLES NICKLAUS ET ALS
Petitioners

v.

THE CITY OF COLUMBUS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

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October Term, 1973

No.

CHARLES NICKLAUS ET ALS
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v.

THE CITY OF COLUMBUS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners, Edwards, Lastorias and Trapps, pray for a writ of certiorari to review the orders of the Supreme Court of Ohio entered June 14, 1973 and July 18, 1973 overruling the motion to certify and dismissing Petitioners appeal of right, dismissing the appeal from the Court of Appeals for Delaware County, Ohio, affirming the judgment of the Court of Common Pleas of Delaware County, Ohio, in Case Nos. 20,992 and 21,069.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Delaware County, Ohio, rendered a written decision on December 12, 1972 (Appendix A, infra p 6).

JURISDICTION

The order of the Supreme Court of Ohio, entered on the 18th day of July, 1973, denying jurisdiction is attached hereto (Appendix D, infra p15).

The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari, "where any title, right, privilege

or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Where Respondent appropriated sufficient property to construct a water reservoir and allocated a definite boundary in its original engineering plans and specifications for a protective-strip for the safety of the abutting lot owners, and the abutting lot owners relied on such protective-strip as lateral-support for their lots, and where Respondent failed to keep in repair some of its lateral-support or protective-strip, which negligence resulted in causing portions of Petitioners' property to erode – is there a legal duty imposed upon Respondent to repair and/or provide protective works, and should mandatory injunction be granted to require Respondent to construct protective works on its protective-strip or on Petitioners' abutting property, especially where Petitioners are willing to sell easements to Respondent for such use; is the denial of such remedy and the erosion of parts of Petitioners' lands through Respondent's neglect a taking of Petitioners' property without due process contrary to the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 19, Article I, Ohio Constitution:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war

or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const 1802, Art VIII, §4.)

STATEMENT OF THE CASE

Petitioners own improved residence properties adjacent to the land owned by Respondent, which land abuts the shoreline of Hoover Reservoir owned by Respondent.

Petitioners' lands are now being eroded due to the fact that Respondent refused and neglected to repair its protective-strip which served as lateral-support for Petitioners' properties.

Respondent did rip-rap the properties of some of the neighbors of Petitioners, which neighbors were formerly Plaintiffs in the Court below, and their appeal has been settled and dismissed.

Respondent refuses to save the erosion of Petitioners' properties for the reason that it is not *economically feasible* but will acquire such properties and allow them to erode.

Petitioners are willing to sell easements over their properties under the same circumstances as Respondent acquired easements over properties of the Plaintiffs who settled with Respondent.

At the time Petitioners filed their injunction, there were no appropriation proceedings filed by Respondent.

There is no appropriation proceeding filed or pending against Petitioners Edwards and Lastorias. **Yet their lands are being taken by Respondent.** Subsequent to the filing of the Petitioners' petition, appropriation proceedings were filed against Petitioners Trapps.

Respondent's project caused some portions of Petitioners' lands to be eroded before any appropriation proceedings were filed. Petitioners' properties are situated next to the properties of those Plaintiffs whose properties are rip-rapped. The value of Petitioners' properties are practically the same as the value of the properties which are already rip-rapped. Petitioners pray for the same relief that Respondent gave to their neighbors. Not giving Petitioners the same relief that was granted to their neighbors is discriminatory.

Subsequent to the filing of complaints in the Common Pleas Court, Petitioners filed their motion to show that their properties were actually caused to erode through the neglect of the Respondent, and they were not compensated for the loss of their land.

Petitioners' remaining lands should be preserved in the same manner as their neighbors' lands are preserved. The cost to preserve Petitioners' remaining lands would be no greater than the cost of their neighbors' properties which were rip-rapped by Respondent.

Save the Soil is a Federal Project. This is exactly what Petitioners are urging Respondent to do. Instead, Respondent is actually in the act of acquiring Petitioners' properties to allow them to erode *and not to control erosion.*

HOW FEDERAL QUESTIONS PRESENTED

The Constitutional question here involved was first put in issue in the trial Court, in the Court of Appeals, in the notice of appeal, and in the memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 73-372.

REASONS FOR GRANTING THE WRIT

A. The State Court's rulings are confiscatory and are a taking of Petitioners' property without due process.
B. The State Courts disregarded the owners' rights to be protected in their property. By allowing the

Respondent to allow erosion of Petitioners' property without just compensation is contrary to the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Ohio.

The Fourteenth Amendment to the Constitution of the United States protects private property from appropriation by a state without due process of law. See, Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; Bank of Toledo v. Toledo, 1 Ohio St. 622 (1853); 19 O. Jur. (2d) 414. Eminent Domain, Section 7; 2A Nichols on Eminent Domain (3rd Ed., 1970), Section 7.31.

The constitutional provisions which require due process of law are of general application to all branches of government and thus affect the power of eminent domain. On the one hand, the sovereign is vested with the inherent right of eminent domain. *On the other hand, the property owner is vested with an equally inherent and fundamental right not to be deprived of his property without due process of law.* This conflict has been resolved in favor of the right of the property owner to the extent that the exercise of the power of eminent domain is limited by the prohibition against depriving a person of his property without due process of law. Hessel v. A. Smith & Co., 15 F. Supp. 953 (1936); Sargent v. City of Cincinnati, 25 N.P. (NS) 89, affirmed 110 Ohio St. 444 (1923).

The evidence in the case at bar is quite explicit that respondent neglected to keep in repair the lateral support for petitioners' property. The testimony of the witnesses shows that it would be feasible to rip rap petitioners property rather than to deprive petitioners of their land. The costs for these three properties is not prohibitive since the next door neighbors property is rip rapped there is no difference in the land and there is no reason for discriminating between the Plaintiff's who are not now involved in this case who have received their rights to have their properties rip rapped and the present petitioners.

There was no appropriation petition pending against any of the petitioners at the time when petitioners sought their relief in the state courts. The decision of the

state courts disregards entirely the fact that petitioners lands were being taken without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS, FIFTH DISTRICT
DELAWARE COUNTY, OHIO

CHARLES NICKLAUS, *et al*,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS, OHIO,
Defendant-Appellee,
and
HELEN M. RIPPEL, *et al*,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS, OHIO,
Defendant-Appellee.

JUDGES:
HON. LELAND RUTHERFORD, PJ
HON. NORMAN J. PUTMAN
HON. PAUL D. VAN NOSTRAN

Case No. 72-4-A

M E M O

Case No. 72-4-B

Decided Nov. ...., 1972.

APPEARANCES

HUGH E. KIRKWOOD, JR. and LEDA C. HARTWELL, attorneys for Plaintiff-Appellants.
JAMES J. HUGHES, JR., ROBERT A. BELL, EARL J. SILBERMAN, DONNA J. BOWMAN, attorneys for Defendant-Appellee.

PUTMAN, J.

Only three appeals remain before this court: Edwards, Trapp and Lastoria. It was represented to the court by appellants' counsel that the appeal of Arnold was terminated May 13, 1972 by action reflected in Deed Book 366, page 152 of the Delaware County records.

There are six Assignments of Error styled but the essence of all is that the refusal to grant the injunction was an abuse of discretion and contrary to law.

We overrule all assigned errors and affirm the judgment. Our reasons follow.

Appellants filed suit against appellee demanding equitable relief in the following causes of action:

1. To enjoin appellee from proceeding in eminent domain to appropriate appellants' property on the grounds there is no public necessity and, therefore, no public use or public purpose.

2. Mandatory injunction to require appellee to constructive protective works on appellee's property to control natural erosion.

The trial court found for the appellee and determined that from the facts in this case the appellee was proceeding in actions in appropriation according to law for a public purpose and that appellee has no legal duty to provide protective works on its or appellants' properties.

The trial court after consideration overruled a subsequent motion submitted December 20, 1971, by appellants requesting a temporary restraining order and oral argument.

The trial court also made separate Findings of Fact and Conclusions of Law.

The evidence supports the appellee's (City) statement of facts which is substantially the following.

Appellee owns, operates and maintains, as part of its water system, a public utility known as Hoover Reservoir. It also serves as a recreational facility for the public generally. The land and water area lies partly in Franklin

County and partly in Delaware County. The shoreline around the water area is presently owned in fee simple by appellee in varying distances from the water's edge. The entire area, including the shoreline, is available to the public. The construction of the dam was completed about 1954 and became operative in 1955.

Frank Wright, Superintendent, Division of Water of appellee, testified at the time of trial, that in 1965 it became apparent there was a critical shortage of water. The only apparent relief at that time was a federally sponsored project, Alum Creek Dam, which was continually delayed because of a shortage of funds. A determination was made that the target date for the completion of the federal project was too speculative to place any reliance upon it as a source of relief.

Along with the water shortage appellee also determined there was a need for flood and erosion control and additional property appropriation to protect and maintain the reservoir generally.

Appellee appropriated $100,000 for professional engineering services and entered into a contract with Burgess and Niple, Columbus, Ohio. See appellee's Exhibit A (hereafter A/E) Ordinance 1108-69.

The results of the engineers' studies and reports and appellee's own findings indicated that eight feet flood gates should be constructed for increased water supply and flood control. In addition, it was determined that in areas where structures on abutting private property were threatened, protective measures to help control erosion should be used and rip-rap, although expensive, was suggested either as to all or part of a parcel, based on good engineering practices. In other areas, appellee, because of protective covering not being feasible, and/or because of prohibitive costs, determined to allow natural erosion. However, also to protect the public character of the reservoir generally it was determined that it was necessary to make additional appropriations of private property. (See Exhibit F)

The incidental benefit to the abutting private property owners was, in some cases, protective covering, while in

others there would be no loss of their remaining private property to erosion.

Appropriations to accomplish those purposes was, at the time of trial, $580,000, plus the $100,000 for engineering services.

See A/E B and C, Ordinances 1088-70 and 459-17, the latter of which included 12 parcels to be appropriated, including appellants, Trapp.

However, the maximum height to which the flood gates have been raised is 1.7 feet in May, 1970, which increased the level of the reservoir to 891.7 feet.

The eight foot flood gates were erected about 1970.

The level of the water in the reservoir is 890 feet above sea level. *If* the gates were completely raised the highest possible level would then be 898 feet. However, it was never raised higher than 1.7 feet, which was in May, 1970 (R/P 266, F. Wright's testimony). The highest they could be raised at time of trial was 3 feet. T/P 266.

Yet, at any level the appellants' property at existing property lines would not be flooded according to the engineer's report, Mr. Wright's testimony and appellee's Exhibit 4, Burgess & Niple's map of the reservoir, surrounding shoreline and appellants' properties.

When appellants became aware of the pending appropriations suit was brought to require appellee to put protective works on its and appellants' properties and to enjoin the appropriation proceedings.

Appellee does not deny that erosion has taken place along the shoreline. Appellee does deny that appellants' properties are eroded or flooded; that appellee has a legal duty to provide protective works on its property or that of appellants to prevent natural erosion or that appellee has no right to appropriate.

The nub of the relief requested of the Common Pleas Court was stated in oral argument to be:

1. orders to construct erosion preventing structures on city property.

2. orders stopping allegedly unnecessary taking by eminent domain of appellant's land.

The second conclusion of law as determined by the trial court is:

> "2. Defendant has not abused its discretion, committed fraud or acted arbitrarily in the erection of flood gates or in the present stage of proceedings for increasing its water supply, controlling downstream flooding, controlling erosion to its property or others and in eminent domain proceedings."

At the present stage of proceedings the flood gates have been constructed to raise the level of the water three feet although when completed it would be possible to increase the level eight feet, from a present 890 feet above sea level to 898 feet above sea level.

As explained in the statement of facts the appellees goals were fourfold:

1. To increase a water supply for the inhabitants of the City of Columbus.

2. To control the flow of water downstream in the interests of flood control.

3. To institute an erosion control program.

4. To protect the appellee's investment in Hoover Reservoir for the preservation of the public peace, property, health, safety and welfare.

The trial court found no abuse of discretion, arbitrariness or fraud on the part of the appellee.

In the findings of fact, the court determined that appellee owned the public utility of Hoover Reservoir and the surrounding shoreline to varying degrees. It further found that the flood gates, were erected for the public purpose of increasing appellees' water supply and to control downstream flooding and that engineering studies were made concerning erosion and that appellee has lawfully determined to proceed with the projects and cannot be required

to provide plaintiffs with protective works or to install such works on its own property. The court further found that appellee is proceeding in a lawful manner in acquiring additional property by paying or proposing to pay just compensation and putting the additional property to a public use. (Findings 1 through 8 inclusive.)

This Court of Appeals finds no abuse of discretion to appear upon the whole record.

To successfully maintain a cause of action for injunctive relief, appellants must show a clear right thereto, and sustain the necessary burden of proof by clear and convincing evidence. We find no such evidence.

The trial court in Findings of Fact 1, 2, 3, 6 and 8 and Conclusions of Law 1 and 3 has determined the public purpose and use of the Reservoir as a utility and that the proposed acquisition of appellant's properties is for a public use and purpose. We find no abuse of discretion by the court in these statements, and find the acquisition is for a public purpose.

Many of the grievances aired by appellants at the oral argument may carry great weight in proceedings to determine how much money will be necessary to compensate them for the property taken and damage to the residue.

While this court is aware of the rights of the appellants in such a proceeding those matters are beyond our power to adjudicate in this appeal.

All assignments overruled.

Judgment entry to be submitted dismissing the appeals as to those appellants with whom the City of Columbus has made settlement and affirming the judgments appealed from by appellants with whom settlement has not been made.

RUTHERFORD, P. J. and VAN NOSTRAN, J., concur.

NORMAN J. PUTMAN
LELAND RUTHERFORD
PAUL D. VAN NOSTRAN,
Judges.

COURT OF APPEALS, FIFTH DISTRICT
DELAWARE COUNTY, OHIO

CHARLES NICKLAUS, *et al.*,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, OHIO,
Defendant-Appellee.
and
HELEN M. RIPPLE, *et al.*,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, OHIO,
Defendant-Appellee.

Case No. 72-4-A

Case No. 72-4-B

ENTRY

This cause came on for consideration of the Court on appeal from the Common Pleas Court of Delaware County, Ohio, of six assignments of error on questions of law and the Court, having considered briefs and oral arguments of counsel for the appellants and appellees, finds that the six assignments of error should be overruled and that judgment of the said Court of Common Pleas should be affirmed.

The Court further finds that the only remaining appellants in this matter are the following named persons, i.e. A. P. and Josephine Lastoria, H. J. and Ruth J. Edwards and Orlo C. and Frances V. Trapp, all others being dismissed as to this appeal.

This cause came on for further consideration of this court upon appellants' motion for reconsideration of its decision filed December 12, 1972. The Court, being fully advised in the premises, finds the motion not well taken and should be overruled.

It is therefore ordered, adjudged and decreed that the six assignments of error should be and hereby are overruled and that the judgment of the Court of Common Pleas of Delaware County should be and hereby is affirmed.

It is further ordered, adjudged and decreed that the only appellants in this appeal are A. P. and Josephine Lastoria, H. J. and Ruth J. Edwards and Orlo C. and Francis V. Trapp.

It is further ordered, adjudged and decreed that appellant's motion for reconsideration should be and hereby is overruled.

Judgment affirmed. Costs to appellants.

.....

LELAND RUTHERFORD, *Judge*

.....

NORMAN J. PUTNAM, *Judge*

.....

PAUL D. VAN NOSTRAN, *Judge*
Court of Appeals—Fifth District
Delaware County, Ohio

APPROVED:

.....

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THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1973 Term
To wit: June 14, 1973

CHARLES NICKLAUS et al.,
Appellants,
vs.
CITY OF COLUMBUS,
Appellee.

No. 73-372
APPEAL FROM THE COURT OF APPEALS
for Delaware County

This cause, here on appeal as of right from the Court of Appeals for Delaware County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Delaware County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this_____

day of_____ 19____

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1973 Term

To wit: July 18, 1973

CHARLES NICKLAUS et al.,
Appellants,
vs.
CITY OF COLUMBUS,
Appellee.

No. 73-372
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of July, 1973.

THOMAS L. STARTZMAN, *Clerk.*

By ..... *Deputy.*

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the relevant constitutional provisions involved are:

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 19, ARTICLE I, OHIO CONSTITUTION

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.